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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAUL GARDEA, JR., Defendant and Appellant.	B286921 (Los Angeles County Super. Ct. No. KA110479)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Raul Gardea, Jr. (Gardea) guilty of attempted first degree murder, as well as assault with a firearm and possession of a firearm by a felon. On appeal, Gardea contends that he received ineffective assistance of trial counsel and that the trial court committed prejudicial error when it denied his motion for a mistrial and overruled his objections to portions of the prosecutor's closing argument. We affirm.

BACKGROUND

I. Charges

The Los Angeles County District Attorney's Office charged Gardea with attempted first degree murder in violation of Penal Code[1] sections 187, subdivision (a), and 664 (count 1), assault with a firearm in violation of section 245, subdivision (a)(2) (count 2), and possession of a firearm by a felon with two priors in violation of section 29800, subdivision (a)(1) (count 3). As to count 1, the district attorney alleged that Gardea personally used and intentionally discharged a firearm causing great bodily injury. (§ 12022.53, subds. (b)-(d).) As to count 2, the district attorney alleged that Gardea personally used a firearm. (§ 12022.53, subd. (a).) Gardea pleaded not guilty to all counts and proceeded to jury trial. The jury found Gardea guilty of counts 1 through 3 and found true the firearm allegations. The parties stipulated that Gardea had suffered two prior felony convictions. The court sentenced Gardea to 35 years to life.

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[1] All further statutory references are to the Penal Code unless otherwise designated.

II. Evidence Presented at Trial

A. *The Attempted Murder of Gregory Villa*

On May 31, 2015, Gregory Villa (Villa) lived in Pomona with his daughter, three grandsons, and girlfriend, Yvonne Contreras. Villa's nickname is "Huero." Yvonne has two sisters, Barbara Contreras and Marissa Contreras.[2] Gardea is the father of Marissa's children and his nickname is "Junebug." Yvonne has known Gardea since 2007 or 2008 and saw him often at Marissa's house. Gardea used to give Yvonne rides in his car.

In the early morning hours of May 31, 2015, Villa was hanging out in his garage along with Yvonne and his neighbor Jeremiah Cooper (Cooper). All three were drinking alcohol. The garage door was open and the area outside the door was lit up. The garage was also brightly lit inside. Cooper leaned against a truck, which was up on blocks. Villa stood with his back toward the open garage door. Yvonne sat on a chair.

At approximately 2:00 a.m., Villa saw that Yvonne had a confused expression on her face. Yvonne observed someone with a bald head walking toward the garage but could not see who it was at first. Yvonne then stood up halfway and saw that it was Gardea. She said, "Hey, brother" and saw that Gardea was carrying a sawed-off shotgun wrapped in white tape in his right hand. Gardea pointed the shotgun at Villa and called out "Huero." Cooper heard the word "Huero," saw the barrel of the gun, and jumped into the bed of the truck. Villa turned around and Gardea shot him in the chest and neck. Gardea shot Yvonne in the face, arm, and legs. Gardea left but Yvonne did not see

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[2] To avoid confusion, we refer to each member of the Contreras family by their first names.

where he went or if he got into a car. Cooper heard a car drive off and jumped out of the bed of the truck. He saw Villa on the ground, stepped over him, and ran to his house.

Yvonne put pressure on Villa's chest and talked to him. A friend called 911 and handed Yvonne the phone. The 911 operator asked Yvonne if she knew who shot Villa. Yvonne said, "It was my brother-in-law." The operator asked Yvonne for his name and Yvonne said, "[I]t's Junebug. Um, I can't think of his —." Villa told Yvonne to give the operator the address. The operator said, "I need to know where your brother-in-law went." Yvonne said, "I don't know where he's at. He just showed up and shot him right here in the garage." The operator asked whether she saw a car and Yvonne said, "I don't know what he was in. He just—I didn't see—I don't know—in an SUV."[3]

Pomona Police Officers Jeffrey Hayward and Eric O'Mahony responded to the 911 call. Officer Hayward saw Villa on the ground with a gunshot wound to his neck. Officer Hayward gave Villa a "dying declaration admonition." Officer Hayward told Villa he could die from his injuries and asked him who shot him. Villa answered, "[P]ossibly [my] brother-in-law. I don't know." After completing his investigation at the scene, Officer Hayward went to an apartment complex to look for Gardea. Officer Hayward did not find Gardea, however. Officer O'Mahony recovered a 12-gauge shotgun birdshot shell at the scene.

In early June 2015, Pomona Police Detective David Estrada entered "a want" in the "system" for Gardea. He also provided other officers information about Gardea's possible whereabouts

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[3] The 911 call was played for the jury.

and directed officers to try to find Gardea at his home. The officers did not locate Gardea, however. Detective Estrada did not try to secure a search warrant for Gardea's apartment because he was uncertain that Gardea lived there and thus did not have sufficient cause for a warrant. Detective Estrada did not go to Gardea's apartment or to a trailer park associated with Gardea to look for him. On June 11, 2015, Detective Estrada showed Villa a six-pack of photographs. Villa was still in the hospital at the time. Although Gardea's photo was one of the six photos, Villa did not identify Gardea in the photos. On August 24, 2015, Detective Estrada arrested Gardea.

B. *Jail Calls*

On August 27, 2015, Gardea called an unidentified man from jail. The call was recorded and later played for the jury. During the call, Gardea said, "I wanted to see Missy eye-to-eye to make sure that she keeps, I guess, if she has any power over her, her [Unintelligible] from showing up, because if, if, if nothing like that goes down, then—" The unidentified man said that he "already talked to her about that" and that "her sister" is "whoring herself out there in Las Vegas." Gardea then said, "[H]opefully, she don't get caught up within the next [10] days or something, because then, then, then I should be more than—I should be more than better." The unidentified man asked Gardea what he needed him to do. Gardea responded, "[J]ust make sure she comes on Saturday for me, that way I can tell her—." The unidentified man said, "Yeah, I'll let her know, I'll let her know she has to go." Later, Gardea said, "But I just need to tell her, because she's all, like, she was telling me to mellow out on a lot of things, and I'm all, like, well, who's telling her this when, when

she should be listening to me, and then the bottom line is, is like I, like I started off anyhow, if, you know what I mean, if her [Unintelligible] whore bagging it or whatever, that's cool, dog, but as long as she don't get caught up, because then just dealing with the subpoena issue right now, if nobody shows up, then I'm, then I'm good."

On August 30, 2015, Gardea called Marissa from jail. The call was recorded and later played for the jury. During the call, Gardea told Marissa, "Well, you need to try to fix that tomorrow if you can, if you want to come see me, because at the end of the day, if your fucking—whatever is doing that prostitution and fucking wherever she's at, she cannot show up, because—." Marissa then interjected, "I don't want to talk about that on the phone, I don't want to talk about any of that on the phone." Gardea said, "Okay, I don't either, I'm just saying—but that's, that's what my attorney told you, right?" Marissa responded, "Yes, exactly." Gardea then said, "Okay, well, good, alright. Well, we should leave it that."

C. *Witness Identifications*

Yvonne testified that she saw Gardea from the top of his chest to the top of his head and that Gardea had a bald head as well as a mustache. Yvonne testified that she immediately recognized Gardea and that she recognized his voice when he said "Huero." Yvonne consistently identified Gardea as the shooter and did not identify anyone else when speaking with police or during any of her previous testimony. Yvonne told Villa that she saw Gardea shoot him. She also testified that Gardea drove a Suburban at the time of the shooting.

Cooper testified that it was "pitch black" and that he did not see the person who shot Villa. Rather, he only saw a silhouette. Villa testified he did not know who shot him and did not recall telling police officers that it was Gardea who shot him. Villa remembered telling a police officer that Yvonne told him that it was "Junebug" who shot him. He described the person who shot him as "Yvonne's brother-in-law" based on what Yvonne told him. Villa also testified that he did not want to come to court to testify and did not want to prosecute someone for shooting him.

During the defense case, Gardea introduced three portions of Detective Estrada's recorded interview with Villa at the hospital. During the interview, Villa was shown a six-photo array and Detective Estrada asked Villa if anyone looked familiar. Villa responded, "[W]ould be in this circle. I want to say this guy."[4] Villa told Detective Estrada and his partner, "[W]hen I got up, he just shot . . . just enough for me to see his face and he shot, that's why it went this way and tore all this—this; it didn't hit no bones or nothing." Later, Detective Estrada's partner told Villa, "[Y]ou can't pick three, you got to pick one." Villa replied, "Yeah, I know, I do. What I'm saying is I need to pick somebody and I don't know who in the hell he is, but . . . ." Detective Estrada's partner said, "[I]f you think you see him there, just say it. I mean we know you don't want to prosecute. But—." Villa said, "But that's not—that's not the fact . . . I don't care for that. I know now in my mind what I'm telling you. I don't give a shit— . . . he can go to jail."

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[4] Although this portion of the transcript does not indicate to whom Villa was referring, Villa did not identify Gardea in this six-photo array.

DISCUSSION

I. Ineffective Assistance of Counsel Claim

Gardea first contends that his trial counsel was ineffective for failing to cross-examine Yvonne about her eyesight and her purported need for eyeglasses. We disagree. Gardea has not shown that trial counsel's performance was objectively unreasonable or that he was prejudiced by counsel's failure to cross-examine Yvonne about her eyesight.

A. *Relevant Proceedings*

Before trial, Gardea was represented by Deputy Public Defender Mary Tennant (Tennant). On August 12, 2016, Tennant declared a conflict and the court appointed Deputy Alternate Public Defender Anthony Cavalluzzi (Cavalluzzi), who represented Gardea through trial. Trial began on February 15, 2017. On May 22, 2017, the jury returned its guilty verdict. On December 12, 2017, Gardea moved for a new trial, claiming that he had received ineffective assistance of counsel at trial. In relevant part, Gardea claimed that defense counsel had failed to present evidence of Yvonne's poor eyesight—evidence which would have impeached and discredited Yvonne's eyewitness testimony—and that Yvonne's aunt, Anna Marie Gomez (Gomez), could have testified as to Yvonne's allegedly poor eyesight.

At the motion hearing, Tennant testified that she had represented Gardea through his preliminary hearing until she declared a conflict at a readiness hearing. During her representation, she had conversations about Yvonne with members of Gardea's family, including Marissa. At some point after the preliminary hearing, Marissa and another family

member told Tennant that they had a prescription for Yvonne which indicated she had poor eyesight. Tennant remembered seeing a "yellowish" piece of paper when they came to court. However, Tennant did not investigate the issue further given that the piece of paper had been provided to her shortly before she declared a conflict. Tennant said that if she had kept the piece of paper, she would have included it with the discovery she gave to the alternate public defender.

George Moreno (Moreno) testified that he worked as an investigator on Gardea's case and interviewed Gomez on June 12, 2016, in order to get background information on Yvonne. Gomez said that Yvonne suffered from mental illness, had tried to commit suicide, and that she "would lie for her man." However, Gomez did not say that Yvonne had poor eyesight or that Yvonne had been unable to get a driver's license due to her poor eyesight.

Cavalluzzi testified that he was appointed to Gardea's case after the public defender's office declared a conflict. He received a discovery file from Tennant and went through every item in the file. Cavalluzzi did not see an eyeglass prescription for Yvonne in the file and never saw a prescription for Yvonne during his representation. Before trial, Cavalluzzi spoke with Gardea's family members about an eyeglass prescription for Yvonne. They told Cavalluzzi that there was a prescription "out there." Cavalluzzi told them that he "had gone through the file more than once. I could not find that prescription. And if we had a prescription, what we actually probably need—on top of that [it] is likely [to] be hearsay—to find the doctor." Cavalluzzi said that he "asked them for any information about the doctor they had seen. I asked them for any pictures they had with her with glasses. And they weren't able to give me any of those things."

Cavalluzzi also conducted his own investigation and obtained Yvonne's DMV records. According to Cavalluzzi, Yvonne's DMV records showed she had been issued a California Driver's License (CDL) and that her CDL number began with a B, thus indicating she did not need corrective lenses. Cavalluzzi's investigator told Cavalluzzi that a CDL number beginning with a "B" indicated "an application of some sort" and if it meant something different, the number would have started with an "X."[5] Cavalluzzi said that based on the CDL number in Yvonne's DMV records, it was his "belief and understanding" that Yvonne had obtained a driver's license at some point.[6] Cavalluzzi did not

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[5] We note that "[e]xperienced counsel may . . . choose to rely on an investigator's report or other form of written statements describing the witnesses' anticipated testimony." (*People v. McDermott* (2002) 28 Cal.4th 946, 992.)

[6] As noted by Gardea on appeal, Cavalluzzi was incorrect. The document Cavalluzzi believed contained information of Yvonne's CDL actually showed she had been issued a California Identification Card. Indeed, under the "License Status" section of the document, it stated, "None Issued." The document also contained a reference to "DL/NO: B6763161." However, because Yvonne had not been issued a CDL, the number actually referred to her California Identification Card. Cavalluzzi also concluded that because the number began with a "B" instead of an "X", Yvonne did not have a vision restriction. However, while other states, such as New York, Virginia, and Minnesota, use an "X" to indicate sight restrictions, California does not. In California, an "X" means the driver can haul hazardous materials in a tank. (See *California Commercial Driver Handbook* at pp. 1-5 <https://www.dmv.ca.gov> [as of Jan. 9, 2019].) In California, a driving restriction for corrective lenses is indicated with "RSTR:

have any independent evidence corroborating the claim of Gardea's family that Yvonne had vision problems.[7] He explained that based on Gomez's interview, during which she did not mention any issues with Yvonne's vision, "I was uncomfortable with calling [Gomez] and thought it would appear as though she was being dishonest to the jury and chose instead not to call her. I think there may have been other information in the interview that I was uncomfortable with as well."

Gomez said that she gave Yvonne's eyeglass prescription to Marissa and that the document was yellow. Gomez further testified that Yvonne was legally blind and her glasses were "very thick." Gomez had not seen Yvonne wear glasses in the last 10 years. Gomez spoke with one of Gardea's attorney during trial and told him about Yvonne's vision problems. However, Gomez did not tell the defense investigator about Yvonne' poor eyesight because "it didn't hit [her] until [she] thought about it" and she saw the prescription. Gomez said that she saw a prescription but did not know the name of the doctor or clinic that had issued it. Gomez said she did not provide any of this information to Gardea's attorney because he had the prescription. She knew this because Gardea's attorney subpoenaed her and told her he

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Corr Lens." (See *Vision Requirements for Driving Class C Vehicles* <https://www.dmv.ca.gov> [as of Jan. 9, 2019].)

[7] On appeal, Gardea contends that the fact that Yvonne was issued a California Identification Card rather than a CDL supported Gardea's claim that Yvonne could not qualify for a driver's license. However, there is no evidence that Yvonne was unable to obtain a CDL, or chose not to apply for one, because she could not or did not want to comply with the DMV's corrective lens requirement.

had seen the prescription but that "it didn't matter." Gomez had a prior conversation with Yvonne about obtaining a driver's license and Yvonne told her that she could not pass the test because she did not have prescription glasses to be able to read.[8]

The trial court denied Gardea's motion for a new trial, finding that Cavalluzzi had not provided ineffective assistance of counsel. The court explained: "With regard to the eyesight, I don't know what to make with that. The witness testifies that [Yvonne] wore glasses in school and hasn't worn glasses in the last 10 years. . . . [Yvonne] testified . . . [and] had to get off the stand and walk to the back of the courtroom and vice versa. I think she did that a few times. And I had no inkling that she had any issue with vision problems. And I don't know if she was shown documents. And I don't recall if she was able to look at them and identify folks from photographs. And I don't know. And I don't have an independent recollection. We heard about a prescription. And I don't know where the prescription came from; how old that prescription was. I don't know that it would have been a viable avenue for [the] defense to pursue based on that information." The court later stated, "The issue of the eyesight, I mean, other than some people saying that [Yvonne] has problems with her eyes and different prescriptions out there somewhere, that's all that the court heard . . . ." The court also noted that Yvonne had known Gardea for a number of years and had never wavered as to the identity of the assailant. Furthermore, the court did not believe Villa's claim that he had identified Gardea

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[8] Yvonne's DMV record and an affidavit from Gomez were submitted with Gardea's motion for a new trial.

at the scene only because Yvonne had already informed him that Gardea was the shooter.

In sum, the trial court found, Gardea's claim had no merit. Cavalluzzi "made tactical decisions . . . [that] were reasonable under the circumstances." Moreover, the court stated, even if Cavalluzzi was ineffective in failing to pursue the area suggested by Gardea, "in the court's view[, this] would not have changed the outcome of the trial."[9] Lastly, the court also made the following finding: "After independently examin[ing] all of the evidence, the court finds that sufficient credible evidence was presented at trial to support the jury's verdict."

B. *Relevant Law*

The standard for establishing ineffective assistance of counsel is well-settled. A defendant must demonstrate that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defendant. (*Strickland*,

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[9] The trial court employed the incorrect standard when reviewing Gardea's ineffective assistance of counsel claim. As discussed below, in order to prevail on this issue, Gardea needed to show that counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that this deficient performance resulted in prejudice in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*).) In applying the correct standard, we nevertheless conclude that the trial court's findings and decision were correct.

supra, 466 U.S. at pp. 688, 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.) " 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ' [Citation.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Gardea bears the burden of proving ineffective assistance of counsel. (See *People v. Mattson* (1990) 50 Cal.3d 826, 876-877.) To that end, a defendant also "bears the burden of showing by a preponderance of the evidence that . . . counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) " 'In demonstrating prejudice, the [defendant] "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." [Citation.]' [Citation.]" (*People v. Loza* (2012) 207 Cal.App.4th 332, 350.)

"Where, as here, the trial court has denied a motion for a new trial based on an ineffective assistance claim, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to the extent they are supported by substantial evidence, but reviewing de novo the ultimate question of whether the facts demonstrate a violation of

the right to effective counsel." (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 590-591, disapproved on another ground in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 314-315; see *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 ["We accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the defendant"].) In particular, " '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308; see *People v. Leyba* (1981) 29 Cal.3d 591, 596-597 [" 'the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court,' " and on appeal " 'all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence' "]; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1463 [" 'It is an established principle that the credibility of witnesses and the weight to be given their testimony are matters within the *sole* province of the trier of fact' "].)

C. *Merits*

We begin with the first element of this claim, deficient performance. To establish the first *Strickland* prong, a defendant must show that "counsel's performance . . . fell below an objective standard of reasonableness under prevailing professional norms." (*People v. Mai (*2013) 57 Cal.4th 986, 1009.) In evaluating *Strickland*'s first prong, "a reviewing court defers to counsel's

reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*Mai*, at p. 1009.)

Gardea contends that the sole defense in his case was Yvonne's purported misidentification of Gardea as the shooter. On appeal, Gardea concedes that Cavalluzzi was justified in concluding Gomez would not have made a credible witness and that there were tactical reasons for not calling Gomez to testify about Yvonne's allegedly poor vision. Gardea also concedes that neither Yvonne's possession of a California Identification Card, instead of a CDL, nor the claim that Yvonne had an eyeglass prescription, conclusively proved that Yvonne had poor eyesight at the time she observed the shooter. The same is true regarding the fact that Yvonne regularly obtained car rides from other drivers. Irrespective of the quality of her vision, without a CDL Yvonne needed to obtain rides from other drivers. That Gardea was one of the people who frequently gave Yvonne rides only bolsters her identification of Gardea as the shooter.[10]

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[10] Gardea also maintains that Yvonne initially misidentified another man as Gardea at a field show-up after the shooting, which supports his claim that Yvonne had poor vision. However, our reading of the record does not support this contention. On cross-examination, Yvonne testified that she was brought to her sister Marissa's home for the show-up. As they drove up to the house, Yvonne thought the man she saw there was Gardea, but "then as we got closer, I realized it wasn't. It was somebody else that I recognized." Although Gardea claims that this man was Gardea's brother as well as Yvonne's former boyfriend—and thus a person with good eyesight should have been able to identify him easily—when asked about this at trial, Yvonne said that the man was *not* her former boyfriend and that

However, Gardea does raise one potentially meritorious issue, contending that, at the very least, Cavalluzzi should have cross-examined Yvonne about her own vision. According to Gardea, Cavalluzzi's failure to cross-examine Yvonne about her vision cannot be excused as a strategic decision. "He simply had to ask her if she had ever worn corrective lenses or been given a prescription for glasses," notes Gardea. "If she answered affirmatively, it would have significantly undermined the credibility of Yvonne's identification testimony. If she answered in the negative, Mr. Cavalluzzi simply could have moved on without losing anything."

According to the prosecution, however, the record demonstrates that Cavalluzzi had reason not to challenge Yvonne's eyesight on cross-examination. If Yvonne had denied having poor eyesight, Cavalluzzi would have had no independent evidence that could have corroborated the family's claim that Yvonne had some sort of vision problem. Although Cavalluzzi had asked Gardea's family for any additional evidence, such as the name of the doctor who wrote Yvonne's prescription or even a photo of Yvonne wearing glasses, they did not provide him with any such material. Therefore, by the time Yvonne testified at trial, the only information Cavalluzzi had regarding Yvonne's eyesight was unsubstantiated hearsay.[11]

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it was her sister Barbara who had a prior relationship with Gardea's brother.

[11] Nor was Cavalluzzi provided with any information regarding Yvonne's specific kind of vision problem. Thus, had Yvonne testified she was near sighted rather than far sighted, which would have supported her identification given her relative

Moreover, in order to show prejudice under *Strickland*, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.) The defendant must establish prejudice as a demonstrable reality, not simply speculation as to the effects of counsel's error or omission. (See *In re Clark* (1993) 5 Cal.4th 750, 766.) In other words, counsel's alleged deficiencies cannot be evaluated based solely on unsubstantiated speculation. (*People v. Mai*, *supra*, 57 Cal.4th at p. 1018.)

Yvonne knew Gardea well. Indeed, she had known Gardea since 2007 or 2008, when she saw him at Marissa's house and he would give Yvonne rides in his car. Immediately after the shooting, Yvonne told the 911 operator that Gardea had shot Villa. Yvonne subsequently testified that Gardea shot Villa, that she saw Gardea from the top of his head to the top of his chest, and that she immediately recognized him and his voice. Yvonne never identified anyone other than Gardea as the shooter. At the scene, Villa told police that it was "possibly [my] brother-in-law" who shot him. Furthermore, while in jail awaiting trial, Gardea made two phone calls urging Marissa and an unidentified male to keep Yvonne from testifying. Gardea's contention that Yvonne had vision problems—and that these problems were severe enough to preclude her from correctly identifying Gardea—is unsubstantiated speculation. Thus, even if Yvonne had testified

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proximity to the shooter, Cavalluzzi would have been similarly unable to contradict this testimony.

she wore glasses or had issues with her vision, there is not a reasonable probability that the result of the proceeding would have been different.

II. Motion for Mistrial Claim

Gardea claims the trial court abused its discretion when it denied his motion for a mistrial based on Yvonne's volunteered statement made during cross-examination. We disagree. The trial court properly denied Gardea's motion because it cured any potential prejudice caused by the statement.

A. *Relevant Proceedings*

During direct examination, the prosecution asked Yvonne what she saw Gardea do after he shot Villa. Yvonne said that she saw Gardea walk away from the house, but she did not see him get into a car. Yvonne said Gardea drove a "grayish brownish" or copper-colored Suburban but that she did not see his SUV on the day of the shooting.[12] Shortly after defense counsel began his cross-examination of Yvonne, counsel moved to suppress a portion of Yvonne's 911 call where Yvonne said, "I don't know what [car] he was in. He just—I didn't see—I don't know—in an SUV." The trial court denied the motion.

Later during cross-examination, defense counsel asked Yvonne, "Do you recall talking to the officers on the evening of the incident about if you saw the suspect walk away or not?"

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[12] On appeal, Gardea contends that Yvonne's failure to see Gardea's car was important to the defense, as it narrowed the scope of her identification to the few seconds before Villa was shot and the sound of the shooter's voice when he called out "Huero."

Yvonne said, "I recall talking to the officers. I told them, 'I don't know where he went. I didn't see him walk away or drive away. I just seen him disappear.' That was it." Counsel then asked, "Do you remember testifying at the preliminary hearing that you actually saw the perpetrator walk away, walk away to his car, truck, and leave?" Yvonne responded, "No. I didn't say that; that I seen him walk away to his truck. I seen him walk away. And that was it." Counsel then asked, "Do you remember being asked, 'What kind of car was it?' and saying, 'Suburban, I believe'?" Yvonne replied, "They asked me what kind of car he drives. I didn't see it. I told the cops that." Counsel followed up by asking, "Even when you were answering the questions at the preliminary hearing, what you were talking about is the car the defendant normally drives?" Yvonne confirmed this was correct. When counsel then asked, "Not what you saw him driving that night?" Yvonne said, "Right. *But somebody else saw it there*." (Italics added.) At this point, counsel lodged an objection without naming a specific ground. The trial court sustained counsel's objection, struck Yvonne's last statement, and instructed the jury to disregard the statement. The court also admonished Yvonne to answer the questions but to wait until the next question was asked before answering again.

During the prosecutor's redirect of Yvonne, defense counsel renewed his motion to suppress and also moved for a mistrial based on Yvonne's volunteered statement: "But somebody else saw it there." Counsel argued: "I feel like I have to renew the motion based on her testimony on cross-examination that what she communicated even at the preliminary hearing was based on what she heard. Now, she also decided to throw in that someone else saw that, which occurred in front of the jury, which I think is

highly damaging and evidence that we're not gonna hear at the trial. I am gonna make a motion to, again, suppress that statement because it's, clearly, based on what she heard from someone else, and she was very clear about it here . . . . I also feel a need based on that information coming in the way I [*sic*] did to make a motion for a mistrial. The jury has now heard what it would otherwise not hear, and I don't believe the bell can be unrung." The prosecution responded, "The court granted a motion to strike it. It was an offhanded comment, not in response to a question. And counsel dealt with it immediately and appropriately. And the court struck the answer." The trial court denied the motion for a mistrial, correctly noting, "I am certain that I directed the jury to disregard, and then I admonished the witness."

B. *Relevant Law*

A witness's inadvertent or volunteered statement can provide the basis for a mistrial. (See *People v. Rhinehart* (1973) 9 Cal.3d 139, 152, disapproved on other grounds in *People v. Bolton* (1979) 23 Cal.3d 206, 213-214.) However, a trial court should grant a motion for mistrial "only when a ' "party's chances of receiving a fair trial have been "irreparably damaged." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 282), that is, if it is "apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*Ibid.*) Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion. (See *People v. Valdez* (2004) 32 Cal.4th 73, 128.)

"Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony, and, ordinarily, we presume a jury is capable of following such an instruction." (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834 (*Navarrete*); see *People v. McNally* (2015) 236 Cal.App.4th 1419, 1428-1429 [juries often hear unsolicited and inadmissible comments and, absent evidence to the contrary, the error is deemed cured by judicial admonishment].)

C. *Merits*

In short, Gardea argues, Yvonne's statement, "But somebody else saw it there," might have led the jury to believe that another person beside Yvonne could place Gardea at the scene of the shooting, which would have bolstered Yvonne's credibility. Gardea repeatedly contends that Yvonne purposefully blurted out this comment to make herself appear truthful.[13] Gardea further argues that the statement was so unduly prejudicial, it could not be cured by striking the statement and admonishing the jury. According to Gardea, the court's prejudicial error requires a new trial.

Gardea cites *Navarrete*, *supra*, 181 Cal.App.4th 828 in support of his claim. In *Navarrete*, the defendant was charged with committing a lewd act on a four-year-old girl. (*Id.* at p. 830.) The trial court granted the defendant's motion to suppress statements he had made to detectives before being advised of his *Miranda* rights. (*Navarrete*, at p. 831.) One of the detectives was

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[13] Gardea offers no evidence to support this particular allegation and we therefore reject it. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1081 ["speculation is not evidence"].)

upset by the trial court's ruling and "promised he 'was going to show' the court." (*Id.* at p. 832.) When the detective took the stand to testify, he was asked why he had decided against testing swabs taken from the victim's body. The detective answered: " 'Well, for several reasons, the first of which it's a court rule that the defendant's statement is inadmissible. So I can't state the first reason.' " (*Id.* at p. 831.) The trial court struck the testimony and gave a curative instruction to the jury. (*Id.* at pp. 831-832.) The defendant was convicted.

On appeal, the appellate court held that the jury could have reasonably inferred from the detective's testimony that he did not have the swabs tested because the defendant "had confessed or otherwise incriminated himself, rendering DNA evidence unnecessary." (*Navarrete*, *supra*, 181 Cal.App.4th at p. 834.) The court found significant the fact that the detective intentionally testified that the defendant had made a prior statement because he intended to prejudice the jury against the defendant.[14] (*Id.* at p. 836.) Moreover, the court determined, the detective's "misconduct more likely than not achieved the effect he sought." (*Id.* at pp. 836-837.) The court further found that the trial court's curative instructions could not undo the damage inflicted by the

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[14] The court noted that "[a] witness's ambiguous and inadvertent reference to a defendant's out-of-court statement previously excluded by the court may not always require the granting of a mistrial." (*Navarrete*, *supra*, 181 Cal.App.4th at p. 836.) In *Navarrete*, however, the detective's testimony was neither ambiguous nor inadvertent. Instead, the detective's statement "was deliberate, triggered seemingly by his apparent pique at the court's wondering the previous day about the detective['s] credibility when the court granted [the defendant's] motion to suppress." (*Ibid.*)

detective's testimony because the instruction "did not break the link the jury was likely to perceive between a 'statement' and a 'confession' in the context of other evidence the jury heard." The court thus reversed the judgment. (*Id*. at p. 834.)

Navarrete is inapposite. *Navarrete* acknowledged that "a trial court can almost always cure the prejudice of an improperly volunteered statement by granting a motion to strike and charging the jury with an appropriate curative instruction," but that, in this case, the reference to the inadmissible confession was an " 'exceptional circumstance' " where a curative instruction could not undo the prejudice. (*Navarrete*, *supra*, 181 Cal.App.4th at p. 836.) Indeed, *Navarrete* noted, "[a] jury's belief that a defendant may have confessed eviscerates the presumption of innocence." (*Id*. at p. 834.) Gardea's case, however, does not involve the " 'exceptional circumstance' " of a defendant's confession being improperly introduced, nor any analogous circumstance. (See *id*. at p. 836.)

Furthermore, nothing in the record suggests that Yvonne willfully violated a court order, acted in bad faith, or intended to prejudice the jury as did the detective in *Navarrete*. A jury is presumed to have followed an admonition to disregard improper evidence, particularly where there is an absence of bad faith. (*People v. Allen* (1978) 77 Cal.App.3d 924, 934.) Indeed, the trial court's denial of Gardea's motion was consistent with cases where courts properly denied mistrial motions based on volunteered testimony. (See, e.g., *People v. Price* (1991) 1 Cal.4th 324, 428 [court properly denied motion for a mistrial after prosecution witness testified he had taken a polygraph because the testimony was brief and the court admonished the jurors to disregard the testimony].) Given the brevity of Yvonne's objectionable

statement, the striking of her response, and the trial court's immediate admonition to the jury, we find that the trial court properly exercised its considerable discretion in denying the defense motion for mistrial.

III. Closing Argument Claim

Gardea also contends that the trial court committed reversible error when it overruled defense counsel's objections to portions of the prosecutor's closing argument because the prosecutor's comments shifted the burden of proof and violated Gardea's right not to testify. We disagree. The prosecutor permissibly commented on the state of the evidence as well as Gardea's failure to call logical witnesses.

A. *Relevant Proceedings*

During rebuttal argument, the prosecutor referenced law enforcement's failure to locate Gardea until weeks after the shooting and argued: "So the evidence regarding whether or not officers went out [to Gardea's home to look for him], that's up for you to interpret. You decide what's a reasonable interpretation based on the evidence. And if you decide that the interpretation that the police didn't do their job is just as reasonable as the police looked for him and didn't find him, then you know what? You adopt the one that says the police didn't do their job and vote—and that is in favor of not guilty. But before you make that leap, decide what's reasonable. And I want to make it very clear the defense has no burden in this case. None whatsoever. They can do exactly as they did. Argue simply that I did not prove my case. However, the defense has the same subpoena power of the People and, easily, could have called Marissa Contreras to say, 'I

live here at this . . . address with my children. Mr. Gardea is the father of my children, and the police never came here one time from May 31st to August 24th.' You could have heard that testimony. And it's not like she's not here."

Defense counsel objected to this statement as "shifting the burden." The trial court overruled the objection, stating that it was a "[f]air comment on the evidence." The prosecutor then continued: "You could have heard testimony from people who lived at that other trailer park. That other address. You could have heard testimony that 'Mr. Gardea was here in my house from May 31st to . . . August 24th, and he wasn't trying to hide from the police.' " Defense counsel again objected to this argument as "shifting the burden." The court overruled the objection and the prosecutor further argued: "But you didn't hear any of that. And, again, they have no burden. But they certainly can call logical witnesses and present evidence just like I can."

The prosecutor also argued that: "The evidence that you heard was that Mr. Gardea told this guy on the phone that [Yvonne] needs to not show up. He committed a crime. And, yeah, we probably could have charged him with it, but big picture we're looking at him trying to kill somebody. That's a consciousness of guilt. He didn't say on those calls, you know, 'I didn't do this. So, you know, if she shows up'—."

Defense counsel objected and requested a sidebar. In chambers, the trial court said: "I will just put something on the record to supplement my prior ruling, shifting the burden. And that rule of shifting the burden, you know, *Griffin* error,[15] does

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15 *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106] (*Griffin*).

not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call all logical witnesses. Such arguments are fair game, and that's *People* [*v.*] *Medina* [(1995)] 11 Cal.4th 694. And the defense argued strenuously that there was no evidence that anyone went looking for Mr. Gardea, and, therefore, that the People's argument is that he fled and on the lam and so on and so forth. At least from this court's perspective, it's fair game to argue that the defense could have brought somebody to buttress that and say, 'No one came looking for him. He was, in fact—he was watching TV every night. And no one ever came there, and he was there on the weekends.' I think that's a fair comment, at least from my perspective. That's the reason for my ruling."

B. *Relevant Law*

A prosecutor may not comment upon a defendant's failure to testify in his or her behalf (*Griffin*, *supra*, 380 U.S. at p. 615), or suggest that a defendant has a burden to produce evidence or a duty to prove his or her innocence. (*People v. Young* (2005) 34 Cal.4th 1149, 1195-1196). However, a prosecutor is allowed to comment "on the state of the evidence or on the failure of the defense to introduce material evidence, or to call logical witnesses." (*People v. Medina*, *supra*, 11 Cal.4th at p. 755.) "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

C. *Merits*

In the first statement at issue, the prosecutor commented in rebuttal that the defense could have called Marissa to say that the police never came to her house to look for Gardea after the shooting. As noted above, a prosecutor is given wide latitude during argument and thus argument may be vigorous as long as it amounts to fair comment on the evidence. (See *People v. Hill* (1998) 17 Cal.4th 800, 819.) Nevertheless, Gardea argues that this statement was not a fair comment on the evidence because "[t]he court and the prosecutor knew of facts withheld from the jury that precluded [Gardea] from calling Marissa as a witness."[16]

We disagree. Gardea was not precluded from calling Marissa as a witness. Although the trial court declined to take judicial notice of Gardea's court appearances in a domestic violence case involving Marissa, this had no bearing on whether Gardea could call Marissa as a witness. Furthermore, the

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[16] On April 13, 2015—shortly before the May 31, 2015, shooting—Gardea was arrested for domestic violence against Marissa. On April 27, 2015, and May 27, 2015, Gardea was out of custody and voluntarily appeared in court in the domestic violence case. Gardea's arraignment in the domestic violence case was set for June 18, 2015, but he failed to appear in court on that date. The court continued the arraignment until August 24, 2015, and Gardea voluntarily appeared in court on that date. A detective then arrested Gardea for the shooting as Gardea walked out of the courtroom. At trial, the prosecutor sought to admit this chronology of events as evidence of Gardea's flight and evasion of the police. However, the trial court did not consider a missed court date to be evidence of flight and denied the prosecutor's request.

prosecutor's statement was made in response to defense counsel's argument. In closing, defense counsel argued that the prosecution did not provide any evidence that an officer went to Marissa's house to look for Gardea and thus could not prove Gardea was "on the run" after the shooting. However, "[a]rguments by [a] prosecutor that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026; see *People v. Hill* (1967) 66 Cal.2d 536, 562 ["No misconduct can be charged where the remarks are responsive to defense counsel's argument and do not go beyond the record"].) Indeed, Marissa was the logical witness to support Gardea's argument. The prosecutor also repeatedly emphasized that the burden of proof remained on the People. Thus, the prosecutor's comment did not impermissibly shift the burden of proof to the defense and was not improper.[17] (See *People v. Wash* (1993) 6 Cal.4th 215, 263; *People v. Hall* (2000) 82 Cal.App.4th 813, 817.)

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[17] The prosecutor also commented in rebuttal that the jury heard about Gardea following "bad advice from a lawyer" before seeking to prevent Yvonne from appearing in court. The prosecutor noted that "we didn't hear any evidence that a lawyer told anyone that these people should not show up. So we're just assuming that. The evidence that you heard was that Mr. Gardea told this guy on the phone that she needs to not show up." On appeal, Gardea argues that this was not a fair comment on the evidence because calling his prior counsel as a witness would have waived the attorney-client privilege. However, defense counsel did not object to these particular comments and therefore any challenge to them on appeal is forfeited. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 756.)

In the next statement at issue, the prosecutor commented on Gardea's phone calls from jail, noting that: "He didn't say on those calls, you know, '*I didn't do this*. So, you know, if she shows up'—." (Italics added.) Defense counsel objected and requested a sidebar conference. The trial court prohibited the prosecutor from making any further comments on Gardea's failure to claim innocence. The prosecutor complied with the court's ruling. On appeal, Gardea argues the prosecutor committed *Griffin* error by noting that Gardea did not declare his innocence in the jail calls because the only person who could do so was Gardea, thereby implying that Gardea should have testified in his own defense.

In *Griffin*, *supra*, 380 U.S. 609, the United States Supreme Court held that a prosecutor may not comment on a defendant's failure to testify in his or her own behalf. The holding of *Griffin* "does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.]" (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339.) Thus, "a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand. [Citations.]" (*Ibid*.) In ascertaining whether *Griffin* error occurred, we must determine if there is a reasonable likelihood jurors could have understood the prosecutor's allegedly improper comment—when viewed in the context of the argument as a whole—as a reference to a defendant's failure to testify. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

Here, the prosecutor simply noted in passing that Gardea did not say on the recorded jail calls that he "didn't do this." The

prosecutor did not highlight or refer to Gardea's failure to testify. Rather, this was a proper comment on the state of the evidence presented at trial. (See *People v. Taylor* (2010) 48 Cal.4th 574, 633.) Even assuming that the prosecutor's comment was improper, the error was harmless. (See *People v. Northern* (1967) 256 Cal.App.2d 28, 30 [prosecutor's comment: "Looking at this evidence which, incidentally, has not been refuted by the [d]efendant, there is no controverting evidence from the other side" (italics omitted) was harmless error even though it was repeated several times].) Here, the comment was brief, unrepeated, and did not suggest that Gardea was guilty because he did not testify. Indirect and brief references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn from that failure, uniformly have been held to constitute harmless error. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1340.) Moreover, the trial court instructed the jury not to consider the fact that Gardea did not testify or to let the exercise of the right not to testify influence its decision in any way. We presume the jury followed the trial court's instructions rather than relying on brief comments by counsel. (*People v. Morales* (2001) 25 Cal.4th 34, 47 ["we presume that the jury relied on the instructions, not the arguments, in convicting [the] defendant"].)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.